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No. 82-850

In the Supreme Court of the United States

October Term, 1982

EDWIN F. GORDON,
Petitioner,

vs.

GEORGE A. TERRY, SR., et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF GUSTAVE T. BROBERG, JR., RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Respondent Broberg submits that Petitioner Gordon's phrasing of the questions presented for review is argumentative, contrary to the provisions of this Court's Rule 21.1.(a), and that the questions actually presented by this case may fairly be stated as follows:

1.

Does the Petition for Writ of Certiorari meet the requirements of this Court's Rule 17, entitled "Considerations governing review on certiorari"?

2.

Was the United States Court of Appeals correct as a matter of law to affirm the granting of summary judgment to all defendants except for defendant Green?

LIST OF ALL THE PARTIES

Respondent Broberg accepts the Petitioner's list of all parties.

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OPINIONS BELOW

Respondent Broberg accepts the Petitioner's citations of the opinions and judgments delivered in the courts below except that the opinion of the United States Court of Appeals now proposed for review is reported as *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982).

JURISDICTION

Respondent Broberg accepts the Petitioner's statement of the grounds on which the jurisdiction of this Court is invoked, though Respondent Broberg does not concede that the Petition for Writ of Certiorari meets the requirements of this Court's Rule 17.

STATUTORY PROVISIONS AND RULES INVOLVED

Respondent Broberg accepts the Petitioner's statement of the statutory provisions and rules involved except that this Respondent adds Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Respondent Broberg cannot accept the Petitioner's statement of the case as being a sufficient summary of ". . . all that is material to the consideration of the questions presented . . .". See, Rule 34.1.(g) of this Court's Rules.

Proceedings Below

Respondent Broberg adopts the condensed and concise "Procedural History" contained in the United States District Court's Order of Dismissal, as follows:

> . . . The plaintiff, Edwin F. Gordon, first filed his complaints in the Southern District of New York in March and April of 1976. The cases were transferred to the Sothern [sic] District of Florida . . ."
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> • • •
>
> The complaints as originally drafted were virtually incomprehensible but the Court (mistakenly it turned out) nevertheless endeavored to ascertain their meaning. The complaints were accompanied by a multitude of affidavits, supporting documents, amendments and amendments to amendments. The Court, unable to decipher the language of the various written docu-

ments, set the cases for a hearing in September of 1976 in order to allow the plaintiff an opportunity to explain what he was attempting to assert in the various complaints. Immediately prior to the hearing the plaintiff filed yet another amendment to the amended complaints.

At the hearing, at which plaintiff and his counsel responded frankly to certain questions regarding the subject matter of the complaints, the Court concluded that the plaintiff had failed to allege that a security was involved and, as a result, the Court was without jurisdiction. *See* Transcript of Hearing on Motions, September 20, 1976. The Court's conclusion was subsequently expressed in an Order and memorandum dated September 30, 1976. In that Order the Court noted that a dismissal for failure to comply with Fed.R.Civ.P. 8 would also have been appropriate considering the state of the plaintiff's pleadings.

On appeal, the Fifth Circuit declined to decide the securities issue. Instead, the appellate court took a brief look at the voluminous pleadings and concluded that the plaintiff had failed to comply with Rules 8(a) and 8(c), requiring a short concise statement of the facts supporting a claim for relief. The Fifth Circuit vacated this Court's previous Order and remanded the cases for re-pleading. [*Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979)]

• • •

Since the remand the plaintiff has filed three sets of amended complaints. The first set of amended complaints, though shorter and clearer than the original pleadings, suffered from many of the same deficiencies. The amended complaints were largely con-

clusory and failed to state the factual basis for the plaintiff's claims. The plaintiff then filed his "Second Amended Complaints" and, before the Court ruled on the sufficiency of those complaints, his "Third Amended Complaints." The Third Amended Complaints comply with Rule 8. Although the allegations continue to be somewhat conclusory rather than factual, they are sufficiently clear to enable the Court and the parties to determine the basis of the plaintiff's claim for relief.

At this point several of the defendants, growing impatient with the seemingly infinite number of amended complaints, called for summary judgment. The defendants Green and Heminway Corporation moved for an evidentiary hearing for purposes of demonstrating that these cases are factually identical to *Morsey v. Green*, Case No. WPB-76-8044-Civ-CA. In *Morsey*, a case involving defendant Green and a transaction essentially the same as the transactions alleged by this plaintiff, this Court concluded after a trial pursuant to Rule 42(b), that no security was involved. That decision was affirmed by the Fifth Circuit without opinion. *Morsey v. Green*, 615 F.2d 417 [sic—correct page number is 917] (5th Cir. 1980) [*cert. denied*, ... U.S. ....., 101 S.Ct. 270, 66 L.Ed.2d 131 (1980)].

The plaintiff requested a continuance in order to prepare a reply to the various motions for summary judgment. The Court granted the continuance and set the cases for a hearing. The hearing was to be limited to the issue of whether a security is involved. The plaintiff was given a month and a half in which to depose the principal defendants for purposes of eliciting facts in support of his theory that what he pur-

chased was a security. As a result of various scheduling conflicts, plaintiff claims that he was unable to conduct the depositions.[1] Instead of requesting a continuance, however, the plaintiff waited until approximately a week before the scheduled hearing and then sought to cancel the hearing. In his motion to cancel the plaintiff also asked the Court to recuse on the ground that the Court had heard and decided portions of the *Morsey* case. The plaintiff's motion for recusal was wholly without merit and was denied. Order of July 24, 1980. *See, e.g., In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980).

• • •

After this long convoluted history the Court is in essentially the same position in which it found itself four years ago. The complaints are better drafted but the claims are essentially the same. Despite the plaintiff's numerous factual allegations and legal memoranda, the Court is compelled to reach the same conclusion reached in September of 1976: There is no security alleged; the claims based on the federal securities laws must be dismissed and; assertion of pendent jurisdiction over the remaining claims is not appropriate. (A. 2b-11b)

The plaintiff appealed the above-quoted order, and the United States Court of Appeals affirmed the District Court's grant of summary judgment in favor of the defendants except that the Court of Appeals reversed summary judgment as to defendant Green only. *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982)

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1. Counsel for the defendant Green asserted at the hearing that Green was available for a deposition and that the plaintiff simply failed to schedule it.

Statement of Facts

Defendant Green was a licensed real estate broker, who first met the plaintiff on October 13, 1970. During the period of more than two years from March 23, 1971 through June 20, 1973, the plaintiff became an investor with a small number of other investors in five separate real estate tracts under four separate land title trusts and one so-called limited partnership. (A. 11a, 28a, 3e, 4g)

The objective of all five real estate transactions was to buy tracts of undeveloped land and hold the properties until they could be sold at a higher price. The plaintiff's complaints and affidavits are so verbose that no single page of the record or appendix specifically states this objective, but the complaints and affidavits read in context easily demonstrate that no genuine issue of material fact exists on this point. (A. 12a)

Green was the promoter of the five ventures. Defendant Broberg was and is a practicing attorney, and a member of The Florida Bar. He prepared the written trust agreements which governed the Terry, Overstreet, Hamm and Hobe ventures. The plaintiff has not alleged that defendant Broberg prepared the so-called limited partnership agreement in the Barley case. (A. 11a-14a)

The plaintiff complains in his complaints and affidavits that his net worth was $5 million, and that Green persuaded him to commit himself to $10 million in payments. The plaintiff further complains that after making $4.3 million in payments, he terminated payments to all five ventures which caused him to forfeit his investment under provisions contained in each of the five written agreements that he had signed. (A. 3e)

Even though the five separate written agreements were signed over a period of more than two years, the plaintiff

denies that he read any of the agreements before he signed them, and he denies that he was aware of the forfeiture provisions until long after he signed each of the five agreements. (A. 4e-6e, 6g, 9f)

SUMMARY OF ARGUMENT

Certiorari should not be granted because this case is greatly deficient in meeting the criteria set forth in this Court's Rule 17, entitled "Considerations governing review on certiorari". The opinion of the United States Court of Appeals that the Petitioner/plaintiff desires to have reviewed in large part passes upon the application of Rule 56 of the Federal Rules of Civil Procedure governing summary judgments to the facts alleged by the Petitioner/plaintiff. The plaintiff's allegations in his complaint and in his numerous amended complaints and affidavits were correctly held to be deficient except as to defendant Green.

This case does not involve any conflict with any decision of another federal court of appeals or any departure from the accepted and usual course of judicial proceedings. No important question of federal law has been decided below, and there is no conflict with any applicable decision of this Court.

The United States Court of Appeals has ruled that the Petitioner/plaintiff can attempt to prove on remand that he has a valid claim under the federal securities laws against Respondent/defendant Green, who was the promoter of the five real estate investment transactions involved. Respondent/defendant Broberg submits that this Court should deny the Petition for Writ of Certiorari so that the plaintiff may have his day in court against defendant Green, thereby ending this litigation which has

been pending for nearly seven years due in substantial part to the plaintiff's multiple violations of the Federal Rules of Civil Procedure.

The United States Court of Appeals correctly held that the Petitioner/plaintiff has alleged no fact against Respondent/defendant Broberg which is relevant to any viable legal theory under the federal securities laws. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

1.

Does the Petition for Writ of Certiorari meet the requirements of this Court's Rule 17, entitled "Considerations governing review on certiorari"?

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) is a landmark opinion concerning the criteria that this Court applies in determining whether to grant or deny a petition for writ of certiorari. The case involved the refusal of a private cemetery to permit the burial of a deceased American Indian. In dismissing the writ of certiorari as being improvidently granted, this Court stated the following:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Id.*, 349 U.S. 74

In the *Rice* opinion, supra, this Court cited with approval from its opinion written by Mr. Justice Taft in *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923), as follows:

> [I]f it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Id.*, 261 U.S. 393

The fact that the United States Court of Appeals has ruled in this case that the Petitioner/plaintiff can pursue his claim under the federal securities laws against defendant Green emphasizes that this case is of importance to the parties only. The Petition for Writ of Certiorari should be denied.

2.

Was the United States Court of Appeals correct as a matter of law to affirm the granting of summary judgment to all defendants except for defendant Green?

In the opinion which the Petitioner/plaintiff desires to have reviewed by this Court, the United States Court of Appeals correctly ruled that the Petitioner/plaintiff had the right to control the management of his investments. However, the Court of Appeals further held that a narrow exception to the control rule delineated by *Williamson v.*

Tucker, 645 F.2d 404 (5th Cir. 1981), cert. denied, ... U.S. ....., 102 S.Ct. 396, 70 L.Ed.2d 212 (1981), decided after the District Court granted summary judgment, required reversal of the summary judgment as to defendant Green only. The Court of Appeals ruled that the Petitioner/plaintiff must be given an opportunity on remand to prove his allegation that he was dependent on Green's non-replaceable expertise in buying undeveloped land at low prices and selling it within two years at high prices. The Petitioner/plaintiff does not complain of these rulings.

Instead, the Petitioner/plaintiff presents an over-simplified argument to the effect that if the investment interests were securities as to Green, the interests must be securities as to all of the defendants. The arguments of the Petitioner/plaintiff are indefensible.

This is not a brief on the merits of the case, and we will keep this argument extremely short. The Court of Appeals correctly held that in order to establish a genuine factual dispute, the affidavits of the Petitioner/plaintiff must set forth facts which are relevant to a viable legal theory. *Spectrum Financial Cos. v. Marconsult, Inc.*, 608 F.2d 377, 380 (9th Cir. 1979), cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980).

The Petitioner/plaintiff suggests that he has alleged a valid claim against all of the numerous defendants other than Green on a theory of aiding and abetting securities law violations. The United States Court of Appeals did not specifically address this question, but the result reached by the Court of Appeals is correct on this issue.

To sustain a charge of aiding and abetting securities violations, a showing must be made that there was conscious involvement in impropriety or constructive notice of impropriety. *Woodward v. Metro Bank of Dallas*, 522

F.2d 84 (5th Cir. 1975); *Edwards & Hanly v. Wells Fargo Securities*, 602 F.2d 478 (2nd Cir. 1979); *Monsen v. Consol. Dressed Beef, Inc.*, 579 F.2d 793 (3rd Cir. 1978); *Morgan v. Prudential Group, Inc.*, 527 F.Supp. 957 (S.D.N.Y. 1981).

The Petitioner/plaintiff has failed to show that Respondent/defendant Broberg knew that Green's statement that he could buy land at low prices and sell within two years at high prices was a misrepresentation. In addition, the Petitioner/plaintiff has failed to make any showing that Broberg claimed to have any ability to judge Green's expertise as a buyer and seller of land. There is no material issue of fact that Broberg represented himself to be an attorney who could correctly prepare trust agreements and other documents necessary to complete the transactions. Broberg submits that the Court of Appeals was correct to have affirmed summary judgment in his favor, and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing brief have been mailed with first-class postage prepaid to each attorney for all of the parties in this cause, whose names and addresses are listed below, and that said mailing was carried out at my request by E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Missouri 64106, on the 22nd day of December, 1982, and

I do further certify that I am a member of the Bar of this Court, representing Gustave T. Broberg, Jr., a Respondent, on whose behalf said service has been made, that I have previously entered an appearance in this Court in this cause, that service has been made in compliance with Rule 28.5.(b) of this Court, and that affidavits of service and mailing will be filed in compliance with the provisions of Rule 28.2. and Rule 28.5.(c) of the Rules of the Supreme Court of the United States of America.

/s/ WILLIAM A. GILLEN
WILLIAM A. GILLEN